

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PAUL LARRY GASBARRI,
Appellant.

No. 2 CA-CR 2019-0146
Filed June 15, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20180687001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Heather A. Mosher, Assistant Attorney General, Tucson
Counsel for Appellee

James Fullin, Pima County Legal Defender
By Jeffrey Kautenburger, Assistant Legal Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Paul Gasbarri appeals from his conviction and sentence for possession of a deadly weapon by a prohibited possessor. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Gasbarri. *See State v. Murray*, 247 Ariz. 583, ¶ 2 (App. 2019). In October 2017, Tucson police officers stopped Gasbarri in his truck in connection with an investigation. Officers found two firearms inside the truck: a rifle behind the driver's seat and a revolver under the center console.

¶3 Gasbarri was charged with two counts of prohibited possession of a deadly weapon, as well as first-degree murder, armed robbery, aggravated robbery, kidnapping, and aggravated assault. The trial court severed the prohibited possession charges from the other charges, which were later dismissed.¹ Before trial, Gasbarri filed a motion to preclude any testimony about the dismissed charges, asserting "[e]vidence about counts 1-5 [is] extremely prejudicial and the State's witnesses should be instructed, by the prosecutor, to take caution to avoid discussing or hinting at them."² The state did not object to Gasbarri's motion and agreed "not to go into any of the areas set forth in [his] motion

¹*State v. Gasbarri*, No. 2 CA-CR 2019-0068, ¶ 6, 2020 WL 1546438 (Ariz. Ct. App. Apr. 1, 2020).

²Gasbarri also asked the trial court to preclude, among other things, evidence that he is a convicted felon for the purpose of establishing his prohibited-possessor status, arguing there were other, less prejudicial ways of proving such status. The court denied Gasbarri's motion. Additionally, he argued testifying officers should be limited to describing the reason for the initial stop as an "unrelated" matter, but the court ruled the state could elicit testimony that police stopped him on a "different" or "another" matter.

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in limine.” The court ordered that the state “shall not go into the areas outlined in [Gasbarri’s] motion,” but “in the event any issue arises during trial, same will be addressed at that time.”

¶4 At trial, Officer Gallego testified he had responded to a call for assistance at a gas station as “part of another investigation” where he saw Gasbarri with a truck for which officers had been searching. The officer stated that because he was undercover, wearing plainclothes, and driving an unmarked car, he alerted other officers rather than “confront[ing]” Gasbarri alone. Following Officer Gallego’s testimony, jurors submitted questions about why police officers were interested in the truck and Gasbarri, but these questions were not asked based on the “potential for a mistrial.”

¶5 Other officers, in marked patrol cars and an unmarked SUV, followed the truck after it left the gas station. Officer Parker, who was in the unmarked SUV, testified he had assisted in stopping the truck as it was pulling into a residential driveway. The state asked Parker if Gasbarri was “asked to step out of the truck” during the stop, and he responded that Gasbarri “was contacted from the driver’s side [of the truck] and removed from the vehicle.” When asked if officers retrieved the rifle during the stop, Parker stated, “At that point, we were not conducting any searches. We were detaining the occupant of the truck for other information.”

¶6 Parker testified Gasbarri had been handcuffed and “made to wait about an hour and a half” before Detective Orozco arrived at the scene. Gasbarri asked Parker to clarify his testimony that “there [were] . . . no marked patrol car[s] within an eye’s view” when Gasbarri pulled into the driveway, and he responded that “there [were] probably four marked patrol cars behind the [unmarked] SUV and we had quite a little caravan turning down the street.”

¶7 While questioning Parker as to how well he had been able to see the rifle inside the truck, Gasbarri asked if officers had used flashlights during the stop and where they had been located. Parker responded that they had “tac lights” on their rifles. When Gasbarri asked Parker if he had approached Gasbarri from the passenger side of the truck, he said, “[W]hen I realized there was no passenger, I stepped back to avoid any kind of cross-fire issues. So I am not in a position where I would be able to see the interior of the cab very well from that position.” Jurors subsequently submitted questions about the lighting inside the truck and when the officer was first able to see the rifle.

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¶8 When asked about his occupation, Orozco said, “I’m a police officer . . . assigned to the detective homicide unit.” He testified his role in Gasbarri’s case had been to apply for a search warrant and participate in a search of the truck. Following his testimony, a juror asked what time Gasbarri had taken possession of the truck, but the question was not asked because it called for speculation.

¶9 Gasbarri was convicted of prohibited possession of the rifle but acquitted of the charge involving the revolver. The trial court found he had two historical prior felony convictions and sentenced him to a prison term of eight years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶10 On appeal, Gasbarri argues his “due process rights to a fair trial were violated when prejudicial testimony related to severed and dismissed charges [was] introduced to the jury despite a motion in limine precluding” such testimony.³ Specifically, he claims:

[J]urors heard about an “undercover” officer finding the truck in question, but not “confronting” Gasbarri alone, followed by an orchestrated high-risk stop of the truck wherein a “caravan” of officers arrived on scene and at least two tactically armed officers approached in tandem and “removed” Gasbarri from the vehicle, careful to avoid “cross-fire” issues along the way. This was followed by a homicide detective responding to the scene and questioning a detained Gasbarri.

³Gasbarri also claims the jurors “unnecessarily heard that [he] had been to prison through his former parole officer and the state stressed that he was a convicted felon, referencing his felon status 4 times in opening and 5 times in closing arguments.” However, he does not develop or otherwise support this argument and therefore we do not address it. See Ariz. R. Crim. P. 31.10(a)(7)(A) (appellant’s opening brief must contain supporting reasons for contentions with citations of legal authorities); *State v. Bolton*, 182 Ariz. 290, 298 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”).

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Gasbarri contends this testimony violated the trial court's order precluding "evidence that related to or hinted at the dismissed and severed charges" and prejudiced him because it led to jurors having "questions about why officers were interested in the truck and Gasbarri." Further, he argues the testimony "painted a prejudicial, irrelevant . . . picture of [him] as highly and disproportionately dangerous and involved in a crime greater than the jury was charged with factually assessing." Gasbarri also argues that because his knowledge of the rifle "was not unequivocally or overwhelmingly established"⁴ as evidenced by the jury questions related to the lighting in the truck and how long he had possessed it, "the state simply cannot demonstrate beyond a reasonable doubt that the prejudicial testimony did not affect at least one juror on their guilty verdict."

¶11 The state counters that "Gasbarri does not point to [a] single line of testimony that would have constituted testimony about or even hinting at any of [the] severed counts, the elicitation of which might even arguably have violated the [trial] court's order," claiming he only "asserts, without argument, that the officers' factual testimony about their law-enforcement roles/titles or their actions in this case" violated the court's ruling. The state argues that, in any event, although it agreed not to elicit testimony about the dismissed counts, preclusion of such testimony was not required because the events were "directly relevant" to whether Gasbarri knowingly possessed the firearms. And, the state adds, the charges were severed because of "the potential rub-off effect of the prohibited possessor charges onto the other charges and not the other way around."

¶12 Although the parties disagree as to the applicable standard of review,⁵ the prerequisite to both harmless and fundamental error is that

⁴"A person commits misconduct involving weapons by knowingly . . . [p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor." A.R.S. § 13-3102(A)(4).

⁵Gasbarri contends his arguments are preserved on appeal based on the objections raised in his motion, and the applicable standard of review is therefore harmless error. The state argues that Gasbarri would only be entitled to fundamental-error review on appeal because he failed to object at trial, but that any such claim is waived because he did not allege fundamental error in his opening brief. Because the nature of Gasbarri's claim is that his due process rights to a fair trial were violated, and

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error indeed occurred. *See State v. Soliz*, 223 Ariz. 116, ¶¶ 10–12 (2009). Here, because the testimony at issue did not violate the trial court’s order, no error occurred. Therefore, the parties’ dispute as to the standard of review is irrelevant and we need not address it. *See id.*

¶13 Generally, parties are “not entitled to refer, by innuendo or otherwise,” to evidence the trial court has precluded. *State v. Leon*, 190 Ariz. 159, 163 (1997). In this instance, however, the state neither directly nor indirectly referred to the dismissed counts. Because none of the testimony Gasbarri complains about violated the court’s order precluding the state and its witnesses from “discussing or hinting at” the dismissed charges, no error occurred. And, notably, Gasbarri did not object to the questions; nor did the court intercede and stop the questioning. *See State v. Bible*, 175 Ariz. 549, 595 (1993) (court has discretion to act sua sponte to control courtroom). Thus, even if the state had indirectly elicited testimony about the dismissed charges, the lack of a contemporaneous objection suggests the testimony was within the limits the court had imposed.

Disposition

¶14 For the foregoing reasons, we affirm Gasbarri’s conviction and sentence.

“[c]onstitutional error is one form of fundamental error,” *State v. Burton*, 144 Ariz. 248, 251 (1985), we consider Gasbarri’s argument.